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No. 97-1384

# In the Supreme Court of the United States

OCTOBER TERM, 1997

A. EUGENE MILLER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the notice of administrative claim disallowance transmitted to petitioner commenced the running of the statute of limitations on petitioner's judicial refund suit.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is unpublished, but the decision is noted at 117 F.3d 1414 (Table). The opinion of the district court (Pet. App. 25-33) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 11, 1997. The petition for rehearing was denied on November 24, 1997 (Pet. App. 16). The petition for certiorari was filed on February 23, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

Section 6532 of the Internal Revenue Code, 26 U.S.C. 6532, provides in relevant part:

> **(a) Suits by taxpayers for refund.—**
>
> **(1) General rule.**—No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.
>
> **(2) Extension of time.**—The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary.
>
> **(3) Waiver of notice of disallowance.**—If any person files a written waiver of the requirement that he be mailed a notice of disallowance, the 2-year period prescribed in paragraph (1) shall begin on the date such waiver is filed.

> **(4) Reconsideration after mailing of notice.**—Any consideration, reconsideration, or action by the Secretary with respect to such claim following the mailing of a notice by certified mail or registered mail of disallowance shall not operate to extend the period within which suit may be begun.
>
> * * * * *

## STATEMENT

1. In February 1990, shortly after retiring from a nonprofit association, petitioner received a check for $168,028.47 as a lump-sum distribution of a tax sheltered annuity (TSA) set up for him by his employer. After consulting Internal Revenue Service publications, petitioner erroneously concluded that his TSA distribution was eligible for ten-year income averaging.[1] Accordingly, petitioner elected not to roll over his TSA distribution into an IRA and decided to report and pay the estimated tax for 1990 that would have been due under the ten-year averaging method (Pet. App. 20).

In early 1991, petitioner learned from his former plan administrator that he could not use ten-year

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[1] Petitioner incorrectly characterizes these publications as "misleading and wrong" (Pet. 4). The record before the district court showed only that the publications described some types of distributions that were eligible for income averaging without specifically mentioning that TSA distributions were *not* eligible. Pet. App. 39. The applicable provisions of the Code and regulations, however, clearly reflected that TSA distributions were not eligible for income averaging (*ibid.*). Petitioner evidently reached his incorrect contrary conclusion without reading these statutes or regulations and without consulting a tax professional (*id.* at 39-40).

averaging for his TSA distribution. Petitioner paid the taxes due on the entire TSA distribution and then, after consulting with legal counsel, filed an administrative refund claim with the IRS, together with a six-page letter explaining the claim. In this letter, petitioner stated that he had erroneously believed the TSA distribution to be eligible for ten-year income averaging and that he otherwise would have rolled the TSA into an IRA. He requested permission from the IRS to now make such a rollover retroactively. He claimed that the applicable statute and regulations did not set a deadline for a rollover from a TSA to an IRA or that, if they did, the IRS had discretion to waive the deadline and should do so in his case (Pet. App. 21).

In response to his claim for refund, the IRS Philadelphia Service Center sent petitioner a formal notice of claim disallowance on January 13, 1992. That notice stated that "[t]his letter is your legal notice that your claim is disallowed" (Pet. App. 35). The notice further informed petitioner of his right to sue for a refund and of the two-year statute of limitations for filing suit (*ibid.*):

> If you want to bring suit to recover tax, penalties, or other amounts, you may do so by filing with the United States District Court having jurisdiction or the United States Claims Court. The law permits you to do this within two years from the mailing date of this letter.

The notice also contained the following brief explanation for the disallowance of petitioner's claim (*ibid.*):

> We have disallowed the claim because your distribution does not qualify for the Form 4972, special treatment. Since the money you contributed to

> your TSA, was not taxable when the contributions were made to your TSA. Also, a rollover from a TSA to an IRA must be made within the 60 day period.

From January 1992 to March 1996, petitioner and his counsel communicated with various IRS officials in Philadelphia, Baltimore and Washington, D.C., in an effort to persuade the IRS to reconsider its January 13, 1992, notice of disallowance.[2] Early in this process, on February 21, 1992, the IRS sent petitioner a letter making reference to its prior notice of claim disallowance and reminding him of his right to sue. Petitioner received additional letters from the IRS offices that he contacted that repeated the IRS's position that the time period for a TSA rollover could not be extended beyond the 60 days provided in the statute. None of these letters stated or in any way implied that the IRS was withdrawing its January 1992 notice of claim disallowance or that it was agreeing to an extension of the limitations period. On November 2, 1995, in the last letter sent to petitioner before the filing of this suit, the IRS informed petitioner that it would not allow his refund claim for the additional reason that the two-year limitations period for a refund suit had expired (Pet. App. 42).

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[2] Petitioner filed a suit against his former employer and the plan administrator in the United States Court for the Eastern District of Virginia, seeking damages for an asserted breach of fiduciary duty under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, for failing to advise him that his TSA distribution was not eligible for income averaging. The district court dismissed that suit in 1992. *Miller* v. *Insurance Inst. for Highway Safety and the Prudential Ins. Co.*, No. 92-943-A (E.D. Va.).

2. Petitioner filed the complaint initiating this refund suit on March 8, 1996, more than four years after the IRS mailed the notice of disallowance of his administrative refund claim. The district court granted the government's motion to dismiss the suit as untimely (Pet. App. 25-33). The court of appeals affirmed with a per curiam opinion (*id.* at 1-5).

The court of appeals pointed out that compliance with the unambiguous two-year limitations period in the statute is a condition of the government's waiver of sovereign immunity for tax refund suits (Pet. App. 4). The court noted (*ibid.*) that 26 U.S.C. 6532(a)(4) expressly provides that reconsideration by the IRS of a disallowed claim will not toll the running of the two-year period for filing suit. The court added that petitioner could have sought an extension of the two-year period from the IRS under 26 U.S.C. 6532(a)(2) but failed to do so (Pet. App. 4). The court explained that the notice of disallowance plainly satisfied the requirements of the statute because it was unambiguous in informing petitioner that his claim had been disallowed and included a brief explanation of the reasons for the disallowance of petitioner's claim (*ibid.*).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner's principal argument is that the January 1992 notice of claim disallowance was not sufficient to start the running of the Section 6532 limitations period for filing a refund suit because it did not expressly reflect that the IRS had considered all of

the grounds for refund contained in petitioner's refund claim (Pet. 10). That contention is both factually and legally incorrect.

a. The argument is factually in error because, as the court of appeals noted, the notice "included a brief explanation of the reasons for [the] disallowance" (Pet. App. 4). After clearly advising petitioner that his claim for refund was "disallowed," the notice explained that it was disallowed because the TSA did not qualify for the "Form 4972 [ ] special treatment" for income averaging and because "a rollover from a TSA to an IRA must be made within the 60 day period" (Pet. App. 35). The notice thus expressly responded to the contentions of petitioner's refund claim that no 60-day requirement for rollover of a TSA applied and that, if one applied, the IRS should exercise discretion to excuse it in his case. See page 4, *supra*. As the court of appeals explained, this succinct and clear denial of the refund claim was "adequate notice" to commence the running of the statute of limitations (Pet. App. 4, 35-36). Indeed, the notice was not merely "adequate" it was crystal clear—for it expressly advised petitioner (who was by then represented by counsel) that the period within which a refund suit could be brought was "two years from the mailing date *of this letter*" (*id.* at 35 (emphasis added)).

b. Even if it were assumed that the explanation in the January 1992 notice for the disallowance of petitioner's claim was incomplete, that would not affect the efficacy of the notice. The right to maintain a refund suit under 26 U.S.C. 7422 is expressly conditioned on the taxpayer's compliance with 26 U.S.C.

6532(a).[3] The two-year limitations period for filing a refund suit provided in 26 U.S.C. 6532(a) commences upon the mailing of a notice of disallowance. 26 U.S.C. 6532(a)(1). There is no requirement in the Internal Revenue Code or in the regulations that the notice of disallowance contain any explanation whatever of the reasons for disallowance. As long as the notice that the refund claim has been disallowed properly identifies the tax for which a refund is sought and clearly advises the taxpayer that the claim for a refund of that tax has been disallowed, it is effective to trigger the running of the two-year limitations period. See, *e.g.*, *Smith* v. *United States*, 478 F.2d 398, 399-400 (5th Cir. 1973).

A taxpayer's right to bring a refund suit is not conditioned upon receiving any particular form of denial of its claim for refund. Indeed, a taxpayer may file a refund suit if the IRS has not even acted on the claim for refund if six months has passed from the date the claim was filed. 26 U.S.C. 6532(a)(1). Taxpayer refund suits are therefore frequently filed before the IRS has taken any action whatever on the claim for refund.[4]

The obvious purpose of the notice of disallowance is to advise the taxpayer formally that the IRS has disallowed his claim for refund and that, conse-

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[3] The Court has emphasized that these conditions on the waiver of sovereign immunity must be strictly construed in favor of the United States. *United States* v. *Dalm*, 494 U.S. 596, 608 (1990); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).

[4] Petitioner is thus clearly wrong in asserting (Pet. 12-13) that Congress intended that the IRS would always pass on the merits of a taxpayer's refund claim before the claim became the subject of a refund suit.

quently, he must bring suit within two years if he wishes to continue to pursue his claim. The notice of disallowance sent to petitioner in January 1992 could not have been clearer in informing petitioner that his claim for refund had been disallowed, for it states (Pet. App. 35):

> This letter is your legal notice that your claim is disallowed. We cannot allow your claim(s) for refund or credit for the period(s) shown above.

The notice also expressly advised petitioner of his right to sue and of the fact that he was required to sue "within two years from the mailing date of this letter" (*ibid.*). The notice was therefore effective to trigger the running of the two-year limitations period. Because petitioner's refund suit was filed four years after the notice of claim disallowance was mailed to him, the courts below correctly concluded that it is barred by the statute of limitations.

c. The cases on which petitioner seeks to rely (Pet. 16-19) are inapposite. In *Block-Southland Sportswear, Co.* v. *United States*, 73-1 U.S. Tax Cas. (CCH) ¶ 9230 (E.D.N.C. Nov. 24, 1972), aff'd per curiam, 480 F.2d 921 (4th Cir. 1973), the taxpayer argued that preliminary audit analysis from the Service—known as a "thirty-day letter"[5]—constituted a notice of disallowance of a refund claim and that the taxpayer should therefore be permitted to file

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[5] A "thirty-day letter" is prepared by an IRS examiner. It contains the preliminary results of the examination of a contested return and conveys an invitation to the taxpayer either to accept the results of the examination or (i) provide additional information to the Service or (ii) request a conference with the Service to discuss the examination. See M. Saltzman, *IRS Practice and Procedure* ¶ 8.08 (2d ed. 1991).

a refund suit before the six-month period provided in 26 U.S.C. 6532(a)(1) expired. The court concluded in *Block-Southland* that such preliminary audit correspondence does not constitute a notice of disallowance. 73-1 U.S. Tax Cas. (CCH) at 80,419. In the present case, however, the document mailed to petitioner in January 1992 was plainly not a preliminary thirty-day letter issued as part of an audit examination (see note 5, *supra*). Instead, as the courts below correctly held (Pet. App. 4, 32), it was a formal notice of disallowance that advised petitioner of the rejection of his refund claim.

The other cases cited by petitioner are similarly irrelevant. In *Union Commerce Bank* v. *United States*, 638 F.2d 962 (6th Cir. 1981), aff'g 463 F. Supp. 842 (N.D. Ohio 1978), a taxpayer claimed that the notice of disallowance sent to it was invalid because its refund claim had not been in compliance with Treasury regulations. The Sixth Circuit held that any defects in the refund claim did not affect the validity of the notice of disallowance and that the limitations period began with the mailing of that notice. 638 F.2d at 963. In *Schmitt* v. *Kavanagh*, 91 F. Supp. 659, 661-663 (E.D. Mich. 1950), the taxpayer's refund claim was intertwined with a pending Tax Court case involving a related taxpayer, and the purported notice of disallowance stated *on its face* that the IRS would not consider the claim until the Tax Court case was resolved. Similarly, *L & H Co.* v. *United States*, 963 F.2d 949, 951 (7th Cir. 1992); *Charlson Realty Co.* v. *United States*, 384 F.2d 434, 439-440 (Ct. Cl. 1967); and *W. A. Schemmer Limestone Quarry, Inc.* v. *United States*, 240 F. Supp. 356, 358 (S.D. Iowa 1964), do not support petitioner, because they hold only that a second timely filed refund

claim that asserts a new ground for a refund begins the claim-disallowance process anew. Petitioner does not allege that he filed a second refund claim asserting new grounds. Finally, *Clinton Trust Co.* v. *United States*, 52 F. Supp. 671, 679 (Ct. Cl. 1943), does not stand, as petitioner asserts (Pet. 18-19), for the proposition that a notice of disallowance must expressly disallow all of the grounds for refund. Instead, *Clinton* held that, even when the IRS gives an *erroneous* reason for disallowance, the notice of disallowance is still effective to commence the running of the statute of limitations. 52 F. Supp. at 679.

2. Petitioner incorrectly asserts (Pet. 19-23) that the decision in this case conflicts with the decision of the Eleventh Circuit in *First Alabama Bank* v. *United States*, 981 F.2d 1226, 1230 n.5 (1993). In *First Alabama*, after the IRS had issued a notice of disallowance of a refund claim, an IRS employee had informed the taxpayers orally that the statute of limitations was not running. The Service thereafter issued a second notice of disallowance of the claim. 981 F.2d at 1227-1228. Notwithstanding the asserted confusion resulting from this series of events, the court of appeals concluded that there was insufficient evidence that the first notice of disallowance had been withdrawn and therefore upheld the dismissal of the taxpayers' suit as untimely. *Id.* at 1230.

The court suggested in *First Alabama* that, if letters or other communications sent to a taxpayer *after* the formal notice of disallowance cause the taxpayer to be reasonably confused as to whether the notice has been withdrawn, the two-year limitations period for filing suit would not commence. 981 F.2d at 1230. In the present case, however, there were no communications between petitioner and the IRS after

the notice of claim disallowance that provided any basis for petitioner to conclude that the IRS had withdrawn the notice of claim disallowance. The contention that the decision in this case conflicts with *First Alabama* is thus plainly incorrect.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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